

ACCOUNTABILITY OR PARTICIPATION? DISENTANGLING THE RATIONALES FOR FOI ACCESS TO DELIBERATIVE MATERIAL

by **Judith BANNISTER**, Senior Lecturer, University of Adelaide
 Law School, Australia.

INTRODUCTION

This conference described our age as “the open government era”. The optimism apparent in this title is in many ways entirely justifiable. While open government has evolved slowly,¹ and faced many challenges,² half a century of statutory rights to access government documents has converged with information technology revolution to produce some remarkable results. When the United States *Freedom of Information Act* was passed in 1966, the idea of free online datasets,³ open to anyone anywhere in the world with access to a hand-held device, would have been unimaginable.⁴ When the Australian Federal freedom of information legislation was passed in 1982, leaks of government information like those now being disclosed over the Internet through Wikileaks⁵ were being printed in newspapers and monographs.⁶ The Hon. Michael Kirby, former Justice of the Australian High Court, once described the introduction of freedom of information (FOI) as a radical reform, given the long history of

¹ Harold Relyea, *The FOLA a Decade Later*, 39 PUBLIC ADMINISTRATION REVIEW 310 (1979); Samuel Archibald, *The Freedom of Information Act revisited*, 39 PUBLIC ADMINISTRATION REVIEW 311 (1979).

² Alasdair Roberts, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (Cambridge University Press 2006).

³ For example: www.data.gov; www.data.gov.au; www.data.gov.uk. However, when governments choose the priorities for publication of open data sets it is the data with the potential for commercial exploitation that is often given priority over data that might be used to hold governments to account. Paul Bradshaw, *The Transparency Opportunity: Holding Power to Account – or Making Power Accountable?* in TRANSPARENCY IN POLITICS AND THE MEDIA; ACCOUNTABILITY AND OPEN GOVERNMENT 141, 151 (Nigel Bowles, James Hamilton, and David Levy eds., I.B. Tauris 2013).

⁴ For an argument to keep the concepts “open government” and “open data” distinct see Harlan Yu and David Robinson, *The New Ambiguity of “Open Government”*, 59 UCLA LAW REVIEW DISCOURSE 178, 181, 203 (2012). Yu and Robinson argue that “a government can provide open data on politically neutral topics even as it remains deeply opaque and unaccountable” and there is a danger that open data can “allow government officials to placate the public’s appetite for accountability by providing less nourishing, politically low-impact substitutes”. See also response by: Tiago Peixoto, *The Uncertain Relationship Between Open Data and Accountability: A Response to Yu and Robinson’s The New Ambiguity of “Open Government”*, 60 UCLA LAW REVIEW DISCOURSE 200 (2013).

⁵ MICAH SIFRY, *WIKILEAKS AND THE AGE OF TRANSPARENCY* (Scribe Publications 2011).

⁶ See *Commonwealth of Australia v. John Fairfax & Sons Limited*, 147 CLR 39 (1980); *Commonwealth v Walsh* 147 CLR 61 (1980). A case involving an attempt to publish a book of leaked government documents entitled: DOCUMENTS ON AUSTRALIAN DEFENCE AND FOREIGN POLICY 1968–1975. The lead-time for printing and distribution enabled the Federal Government to obtain High Court injunctions on the grounds of Crown copyright.

official secrecy, and “the attitudinal shift that FOI legislation demanded of ministers, departments, agencies and the public service [as] nothing short of revolutionary”.⁷ Governments now talk routinely about transparency and open government as mainstays of democracy,⁸ and government information is recognised as a national resource.⁹ However, there are ongoing tensions about how open government is to be administered that remain unresolved. Some tensions concern competing public interests that will be with us forever: government accountability versus national security, and openness versus the protection of private interests. Other tensions can be traced to fundamental differences in the way that open government is understood. How much disclosure was really intended when the FOI regimes were introduced? Differences in expectations often remain unstated, indeed unrecognised, when terms such as “open government” and “transparency” are invoked with reverence¹⁰ as democratic tenets, without any clear analysis of what openness is intended to achieve. This paper will analyse one specific source of ongoing tension for FOI: the extent to which the public ought to be allowed access to pre-decisional deliberative information, and the timing for disclosure of such material. It will be argued that public participation in the processes of government at the level of policy formulation and decision-making is the most elusive of the purposes claimed for FOI. Promises of participatory democracy can raise expectations about full disclosure of the decision-making process; whilst government officials believe that their “thinking spaces”¹¹ are entitled to some protection from the public gaze. The paper focuses upon the FOI experience in Australia, but that focus requires some understanding of its origins in the United States FOIA. When FOI was originally proposed in Australia it was to introduce a scheme “along the lines of the United States legislation”,¹² “subject to such modifications as would be required to adapt the American system to the Australian constitutional and

⁷ *Osland v. Secretary, Department of Justice*, 234 CLR 275, 303 (2008) Kirby J.

⁸ UNITED STATES. OFFICE OF MANAGEMENT AND BUDGET (OMB) OPEN GOVERNMENT DIRECTIVE (M-10-06) December 8, 2009.
http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

⁹ Australia. *Freedom of Information 1982* (Cth): § 3(3) “The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource”. See discussion in Judith Bannister, *Open Government: From Crown Copyright to the Creative Commons and Culture Change*, 34 *University of New South Wales Law Journal* 1080 (2011).

¹⁰ “Transparency is a term that has attained a quasi-religious significance in debate over governance and institutional design.” Christopher Hood, *Transparency in Historical Perspective* in TRANSPARENCY; THE KEY TO BETTER GOVERNANCE? 3, 3 (Christopher Hood and David Heald eds., Oxford University Press 2006).

¹¹ Australia: Department of the Prime-Minister and Cabinet, *FOI Guidance Notes* July 2011 [41]:
http://www.ag.gov.au/RightsAndProtections/FOI/Documents/FOI_Guidance_Notes_-_Word.RTF.

¹² Election statement by Prime Minister Gough Whitlam in November 1972: *Policy Speech on Freedom of Information*.

administrative structures”.¹³ The “purpose” was to implement a U.S.-style FOIA system. The underlying rationales must, therefore, be sourced in the early American material informing the 1966 United States FOIA along with the Australian implementation.¹⁴

§ 1 – FREEDOM OF INFORMATION – THE RATIONALES

“Open government” and the “right to know” would appear to be unassailable concepts, and they are often expressed in that way. The “right to know” is often characterised as an inherent¹⁵ or fundamental¹⁶ right, or cast in a supporting role to the right to free speech¹⁷, both cornerstones of a democratic society.¹⁸ However, if the balancing of competing rights is to be attempted, then a more precise expression of the underlying rationales for FOI is required.¹⁹ Declaring that citizens have a “right to know” what the government is doing²⁰, whilst irrefutable when expressed in those general terms, tells us little about what exactly must be disclosed. There is a strong temptation to rely upon grand, but vague, objectives because it is difficult to challenge a “lofty goal”.²¹ However, it is also quite difficult to put those goals into practice, and just as difficult to assess whether vague objectives have been achieved.²² The problem is that public expectations can be raised, only to be disappointed when the system is tested.

¹³ Australia. Commonwealth Attorney-General’s Department, *Proposed Freedom of Information Legislation; Report of Interdepartmental Committee*, September 1974, 1: Cabinet Decision No. 30, 10 January 1973.

¹⁴ For contemporaneous accounts see Howard Coxon, *The Freedom of Information Debate in Australia*, 8A GOVERNMENT PUBLICATIONS REVIEW 373 (1981); Alan Missen, *The Australian Freedom of Information Act*, 10 GOVERNMENT PUBLICATIONS REVIEW 43 (1983). For a history of the reforms see GREG TERRILL, *SECRECY AND OPENNESS: THE FEDERAL GOVERNMENT FROM MENZIES TO WHITLAM AND BEYOND* (Melbourne University Press 2000).

¹⁵ U.S. House of Representatives Report No. 1497, 89th Congress, 2nd Session Clarifying and Protecting the Right of the Public to Information (1966) in FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 23 (1974). <<http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/Sourcebk1974Final.pdf>>

¹⁶ Thomas Hennings, Jr., *Constitutional Law: The People’s Right to Know*, 45 AMERICAN BAR ASSOCIATION JOURNAL 667, 668 (1959).

¹⁷ U.S. House of Representatives Report No. 1497, 89th Congress, 2nd Session Clarifying and Protecting the Right of the Public to Information (1966) in FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 23 (1974). <<http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/Sourcebk1974Final.pdf>>

¹⁸ *Ibid* 49.

¹⁹ For an international study see TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY* (UNESCO Paris 2008):

<http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf> 141. Common principles governing FOI include: “promoting transparent, accountable and effective government, controlling corruption, fostering public participation, enhancing the ability of the public to scrutinise the exercise of public power, promoting a democratic and human rights culture and the rule of law, improving public record management, and building public understanding and an informed citizenry.”

²⁰ Thomas Hennings, Jr., *Constitutional Law: The People’s Right to Know*, 45 AMERICAN BAR ASSOCIATION JOURNAL, 667, 668 (1959).

²¹ Ben Worthy, *More Open But Not More Trusted? The Impact of FOI on British Central Government*, 23 GOVERNANCE 561, 563 (2010).

²² *Ibid*.

Recorded information is made available by executive governments under FOI either through proactive publication or upon request.²³ These different approaches to access reflect various purposes of FOI. Information that must be routinely published discloses how government works:²⁴ the functions of agencies, how they are organised and may be contacted. Information must also be published about the substantive rules and policies of general application adopted by government agencies, along with the instructions given to staff on how those rules and policies are to be interpreted and administered. This ongoing disclosure informs the public about the workings of government and provides a level of accountability. Operating alongside this ongoing obligation to publish is the public's right to access specific government records upon request.²⁵ This right to request documents, subject to various exemptions,²⁶ enables individuals in Australia to ascertain whether their personal information is held by government, and also allows any person to investigate and hold government to account. The rationales for open access to government information can, therefore, be expressed both in terms of private rights and democratic processes. FOI is also claimed to play an important role in improving the quality of governmental decision-making. These three quite distinct rationales – individual rights, democratic principles, and improved procedures – are discussed below. The level of disclosure can vary depending upon which rationale is advocated.

A) Protection of private interests when individuals engage with government

FOI laws enable Australians to discover what personal information governments hold about them and to challenge its accuracy. Information concerning how government actions, and information collection, impact upon individuals is probably the least controversial of the FOI disclosures.²⁷

FOI also ensures that members of the public who are affected by government decisions have a right to know in advance what rules,

²³ These have been described as 'push' and 'pull' models, see MOIRA PATERSON, *FREEDOM OF INFORMATION AND PRIVACY IN AUSTRALIA: GOVERNMENT AND INFORMATION ACCESS IN THE MODERN STATE* 498 (LexisNexis Butterworths 2005). Alternatively, 'passive' access on demand or 'active' dissemination: ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *CITIZENS AS PARTNERS; INFORMATION, CONSULTATION, AND PUBLIC PARTICIPATION IN POLICY-MAKING* 12 (2001): http://www.oecd-ilibrary.org/governance/citizens-as-partners_9789264195561-en.

²⁴ See, for example: Freedom of Information Act 1982 (Cth) Part II.

²⁵ See, for example: Freedom of Information Act 1982 (Cth) Part III.

²⁶ See, for example: Freedom of Information Act 1982 (Cth) Part IV.

²⁷ Federal FOI annual reports disclose that the greatest number of FOI requests is for personal information about the applicant and that fewer of these applications are refused. In 2013–2014, 79.7 per cent of all Federal FOI requests were for documents containing 'personal' information: OFFICE OF THE AUSTRALIAN INFORMATION COMMISSIONER, *FREEDOM OF INFORMATION ACT 1982 ANNUAL REPORT 2013–2014* 130, 133 (2014). See table 9.5 to compare figures on refusals of requests: <http://www.oaic.gov.au/about-us/corporate-information/annual-reports/oaic-annual-report-201314/>.

policies and procedures may be applied to them.²⁸ This principle, that the law must be accessible to the public, is an essential counterbalance to the maxim that ignorance of the law is no excuse.²⁹ Knowing what the rules are, and how they will be interpreted, enables individuals to understand the consequences of personal actions and to make decisions accordingly.

B) A cornerstone of democracy

It is the extent of disclosure of information regarding the internal workings of government that is more controversial. It is often this transparency that is discussed in terms of democratic rationales.

1) An informed electorate

For representative democracy to operate effectively voters who exercise the franchise must be properly informed.³⁰ Famously, in his bill-signing statement President Lyndon B. Johnson said of the United States FOIA:

“This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits.”³¹

In this context, FOI disclosure allows the electorate to assess the appropriateness and effectiveness of governments and make an informed choice about who should exercise that power in the future. Sometimes, in the FOI debate, when references are made to “public participation” in the processes of government that participation is not intended to extend beyond this basic involvement of casting an informed vote.

2) Accountability

While citizens are considering future electoral choices, governmental officials who exercise public power are held to account.³² Transparency enables the public to monitor the actions of public servants and to discourage, or expose, corruption and

²⁸ The law ought not to be secret: Victor Kramer and David Weinberg, *The Freedom of Information Act* 63 GEORGETOWN LAW JOURNAL 49, 63 (1974).

²⁹ *Blackpool Corporation v. Locker* [1948] 1 KB 349, 361. Or at least at that time, that legal advisers have access. While in 1948 all statutory law was published by the King’s Printer, Scott L.J. of the English King’s Bench wrote of the ‘the crying need of immediate publication of all matter that is truly legislative’ *ibid* 362

³⁰ Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEORGE WASHINGTON LAW REVIEW 1, 7 (1957).

³¹ Statement by President Johnson upon Signing Public Law 89-487 on July 4, 1966 in FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 195 (1974):

<http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/Sourcebk1974Final.pdf>.

³² Mark Bovens has defined accountability as “a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other” Mark Bovens, *Public Accountability*, in THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182 [8.3.1] (Ewan Ferlie, Laurence Lynn and Christopher Pollitt eds., Oxford University Press, 2007). In the context of this present discussion, the relationship is between government officials and the public.

maladministration. When faced with full disclosure, public servants are more likely to act in the public interest, rather than in their self-interest.

This “watchdog function” has been described as “perhaps the principal inspiration” for the United States FOIA.³³ Transparency is always closely linked to accountability³⁴ because information must be disclosed about actions taken, or decisions made, before those actions can be debated and judged.³⁵ However, accountability through transparency can only go so far: sanctions for wrongdoing may also be required.³⁶

3) Public confidence in government?

Another outcome arising from accountability through transparency is sometimes claimed to be the bolstering of public confidence in government.³⁷ However, the disclosure of corruption and incompetence can have the opposite effect,³⁸ and information can be used as ammunition in unseemly political struggles.³⁹ Nevertheless, over time, transparency should ensure greater confidence in the system overall, if not always in the individuals involved.

C) A mechanism for improving the quality of policy and decision-making

While improving bureaucratic decision-making processes might not seem like a grand purpose, or qualify as the underpinnings of democracy, it is also commonly proffered as a rationale for freedom of information. Open access to information about decision-making raises particular problems for FOI because at its heart is a question of power: who gets the final say and who gets to take part?

1) Through disclosure

While disclosure can inform an electorate, and hold government officials accountable, public scrutiny can also impact the quality of

³³ Glenn Dickinson, *The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 UNIVERSITY OF CINCINNATI LAW REVIEW, 191, 197 (1990).

³⁴ Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?* 33 WEST EUROPEAN POLITICS, 989 (2010).

³⁵ Mark Bovens, *Public Accountability*, in THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182 [8.3.1] (Ewan Ferlie, Laurence Lynn and Christopher Pollitt eds., Oxford University Press, 2007).

³⁶ Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE LAW & POLICY REVIEW 79, 82 (2012).

³⁷ For an early reference to this in relation to the United States see Victor Kramer and David Weinberg, *The Freedom of Information Act*, 63 GEORGETOWN LAW JOURNAL 49, 49 (1974).

³⁸ Ben Worthy, *More Open But Not More Trusted? The Impact of FOI on British Central Government*, 23 GOVERNANCE 561 (2010); Peter Riddell, *Impact of Transparency on Accountability* in TRANSPARENCY IN POLITICS AND THE MEDIA; ACCOUNTABILITY AND OPEN GOVERNMENT 19, 27 – 30 (Nigel Bowles, James Hamilton, and David Levy eds., IB Tauris 2013).

³⁹ Anne-Marie Gingras, *Access to information: An asset for democracy or ammunition for political conflict, or both?*, 55 (2) CANADIAN PUBLIC ADMINISTRATION 221 (2012).

decision-making. Publication can call attention⁴⁰ to the standards being attained, or the failure to meet those standards, and the very fact that the outcome will be published can encourage rigor.

2) Through direct public participation

The idea that open access to information facilitates public participation in governmental processes raises a number of issues concerning individual rights and representative democracy. The ability to cast an informed vote is essential in a representative democracy. Individuals can use their own personal records to challenge the accuracy of government information, seek revision of records, and challenge decisions in courts or tribunals. Other administrative law principles, notably procedural fairness⁴¹, help ensure that individuals directly affected by government decisions are properly informed and given an opportunity to make submissions.

However, public participation in the processes of government at the level of policy formulation, and decisions of general application, are two of the most elusive benefits claimed for open government. What do proponents mean when they say that access to information is justified on the basis that it will facilitate public participation in decisions that impact the public at large?

§ 2 – AUSTRALIAN FREEDOM OF INFORMATION – THE OBJECTS

Public service and parliamentary committees conducted over a decade of reviews and reporting before FOI was introduced in Australia at a Federal level in 1982.⁴² In 1979, the Senate Standing Committee on Constitutional and Legal Affairs published a report on a 1978 version of the Federal FOI Bill.⁴³ The Standing Committee identified three separate justifications for introducing FOI legislation, all of which arose out of the principles of democratic government.⁴⁴ The first two were:

1. “the rights of the individual to know what personal information is held in government files; and
2. the accountability of government through public scrutiny.”

⁴⁰ Kenneth Davis, *The Information Act: A Preliminary Analysis*, 34 UNIVERSITY OF CHICAGO LAW REVIEW 761, 769 (1967).

⁴¹ *Kioa v West*, 159 CLR 550 (1985).

⁴² *Freedom of Information Act 1982* (Cth). While the original proposals to introduce a U.S.-style FOI Act emerged with the Whitlam Labour Government in 1972, it was a Coalition Government under Prime Minister Fraser that brought the reform process to completion, and the task of implementing the reforms then fell to the Hawke Labor government elected in March 1983. For a history of the reforms see GREG TERRILL, *SECRECY AND OPENNESS: THE FEDERAL GOVERNMENT FROM MENZIES TO WHITLAM AND BEYOND* (Melbourne University Press 2000). The Australian States also introduced FOI throughout the 1980s and 1990s commencing with Victoria in 1982: *Freedom of Information Act 1982* (Vic).

⁴³ Australia. Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information; Report on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* (1979).

⁴⁴ *Ibid.*

The third justification is of particular interest to this analysis, and read as follows:

“3. If people are adequately informed, and have access to information, this in turn will lead to an *increasing level of public participation in the processes of policy making and government itself*. Governments should be constantly in receipt of advice, not only from the professional public service but also from other sections of the community and from individual citizens and their members of Parliament. Unless information is available to the people other than those professionally in the service of the government, then the idea of citizens participating in a significant and effective way in the process of policy making is set at naught. This participation is impossible without access to information.”⁴⁵

While it is clear that all participants in governmental processes must be properly informed, and that broad participation is founded upon open access to information, what is less than clear is the kind of public participation that was envisaged. Was it public involvement in governmental processes by the submission of information, or some more direct involvement in the decision-making process?

When the legislation was enacted in 1982⁴⁶ the object clause (section 3) expressed the purpose of the legislation as providing the community with a right to access governmental information. It then obliged government to publish specific information, and created exceptions and exemptions to disclosure that were regarded as necessary to protect essential public and private interests. The legislation did not refer to any underlying democratic principles.

The first annual report by the Federal Attorney-General on the operation of the 1982 FOI Act⁴⁷ listed the following purposes and benefits that the FOI legislation was intended to confer on the relationship between citizens and government:

- “to improve the quality of decision-making by government agencies in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process;
- to enable groups and individuals to be kept informed of the functioning of the decision-making process as it affects them and to know the kinds of criteria that will be applied by government agencies in making those decisions;
- *to develop further the quality of political democracy by giving the opportunity to all Australians to participate fully in the political process;*
- to enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on government files, so that they may know the basis on which decision that can fundamentally affect their lives

⁴⁵ *Ibid* [3.5] (emphasis added).

⁴⁶ Freedom of Information Act 1982 (Cth).

⁴⁷ Australia. Commonwealth Attorney-General, *Freedom of Information Act 1982: Annual Report for the Period December 1982–June 1983*, XI (Parliamentary Paper No. 328) (1983).

are made and may have the opportunity of correcting information that is untrue or misleading.”⁴⁸

The underlying philosophy of FOI was expressed in the first annual report as follows:

- “when government is more open to public scrutiny it becomes more accountable
- *if people are adequately informed and have access to information, there is likely to be more public participation in the policy-making process and in government itself*
- groups and individuals who are affected by government decisions should know the criteria applied in making those decisions
- every individual has a right: to know what information is held in government records about him or her...”⁴⁹

This was a grand call to public participation in the political process informed by access to government-held information. The philosophy extended beyond official accountability for past actions to active public involvement in decision-making processes:

“The greater the extent of open government, the more effective is the opportunity for participation by individuals, groups and the community generally in important political decisions before they are made and for public understanding and acceptance of decisions after they have been taken. Public debate on issues and policies and substantial community participation in the processes of policy-making and government itself, establish essential dialogue between government and those affected by its decisions.”⁵⁰

However, these calls for open and inclusive democratic processes were constrained by references to “the need for confidentiality in the innermost workings of government”.⁵¹ These were mixed messages.

In 1987, the Senate Standing Committee on Legal and Constitutional Affairs⁵² reviewed the operation of the 1982 Australian Federal FOI Act.⁵³ The Standing Committee found widespread support for the FOI and its objectives, but confusion over exactly what that meant when it came to implementation.

“The inquiry revealed that there is widespread support for the FOI Act, and little criticism of its object to make available information about the operation of, and in the possession of, the Commonwealth Government, and to increase Government *accountability and public participation* in the process of government. However, there is some lack of agreement over the degree to which this object has been achieved. This controversy is exacerbated by the lack of

⁴⁸ *Ibid* (emphasis added).

⁴⁹ *Ibid* 2-3 (emphasis added).

⁵⁰ *Ibid* 4.

⁵¹ *Ibid* 5.

⁵² Australia. Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982; Report on the operation and administration of the freedom of information legislation* (1987).

⁵³ Freedom of Information Act 1982 (Cth).

agreement as to the extent to which information in the possession of the Government about its operations should, in principle, be made available to the community at large.”⁵⁴

In the 1995 review of the Federal FOI Act by the Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) the review bodies expressed concern that the object clause in the Act was equivocal. The right of access to documents could be seen as an end in itself, rather than as a mechanism for implementing broader open government principles. Indeed, a narrow reading of the purposes of the legislation could lead to a narrow interpretation of the access right.⁵⁵ The review concluded that the object clause should make clear the underlying rationales for the Act included the following goals to:⁵⁶

- “enable people to participate in the policy, accountability and decision-making processes of government
- open the government’s activities to scrutiny, discussion, comment and review
- increase the accountability of the Executive.”⁵⁷

It took some time to implement the recommendations of the Open Government Review,⁵⁸ but in 2010⁵⁹ the object clause was amended to remove all references to limitations on the right of access.⁶⁰ The following subsection was introduced:

- “s. 3 (2) The Parliament intends, by these objects, to promote Australia’s representative democracy by contributing towards the following:
- (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government’s activities.”⁶¹

The intention is clear that access to government information is granted in order to facilitate public scrutiny of government activity. There is, however, a subtle difference in the wording in relation to public participation. In the Open Government Review the ALRC/ARC envisaged that public participation would extend to the decision-making processes of government.⁶² The words of the

⁵⁴ Australia. Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982; Report on the operation and administration of the freedom of information legislation* [2.5] (1987) (emphasis added).

⁵⁵ Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No. 77 (ALRC) and Report No. 40 (ARC) [4.4] (1995).

⁵⁶ *Ibid* [4.6].

⁵⁷ *Ibid* [Recommendation 1].

⁵⁸ *Ibid*.

⁵⁹ Freedom of Information Amendment (Reform) Act 2010 (Cth).

⁶⁰ The object clause originally expressed the right of access as being ‘limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities’: *Freedom of Information Act 1982* (Cth) § 3 (now superseded).

⁶¹ *Freedom of Information Act 1982* (Cth) (now the current object clause).

⁶² Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No. 77 (ALRC) and Report No 40 (ARC) [4.6] (1995).

reformed object clause anticipate public participation in government processes “with a view to promoting better-informed decision-making”. This approach suggests a flow of information to government decision-makers from the public, but does not necessarily increase public involvement in the decision-making process itself. This raises the question – what is meant by “public participation” when proffered as a rationale for freedom of information?

§ 3 – PUBLIC PARTICIPATION?

Public participation may involve various levels of involvement in the democratic process, ranging from public information campaigns, and invitations to supply information to inquiries and forums, to focus groups and “citizens’ juries”, and even full participatory democracy by televoting⁶³. This range of options has been described as a participation continuum. Access to information is essential at all levels of this continuum.

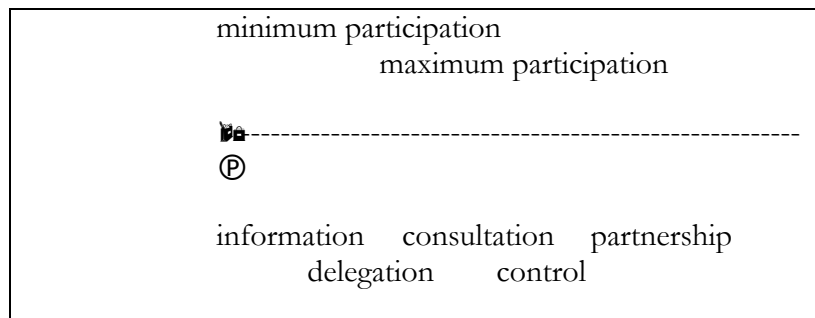


Figure 1: The Shand-Arnberg Participation Continuum⁶⁴

The minimum participation end of this continuum includes information that is voluntarily published through education programs, advertising and promotional materials. Bishop and Davis conclude that this is hardly meaningful participation “since the flow is only one-way”.⁶⁵ Compelled disclosure of information, such as through FOI, offers a little more participation because members of the public have some control over the kind of information they access.⁶⁶

Consultation is the next step on the continuum. The objectives of consultation are “to augment legitimacy and improve the quality of

⁶³ Carolyn Hendriks, *Institutions of Deliberative Democratic Processes and Interest Groups: Roles Tensions and Incentives*, 61 AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION 64 (2002).

⁶⁴ Patrick Bishop and Glyn Davis, *Mapping Public Participation in Policy Choices*, 61 AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION 14, 20 (2002). Citing: D SHAND, AND M ARNBERG, BACKGROUND PAPER IN OECD RESPONSIBLE GOVERNMENT, 15-38 (PUMA Public Management Service, OECD, Paris 1996).

⁶⁵ Patrick Bishop and Glyn Davis, *Mapping Public Participation in Policy Choices*, 61 AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION 14, 20 (2002).

⁶⁶ Bishop and Davis do not consider FOI disclosure specifically, but do list judicial review of administrative decision-making and the principles of procedural fairness as a category of participation that does involve some compelled disclosure. This is participation as standing that ‘enables citizens and interest groups to enter the policy process through the courts’: *ibid* 22.

democratic decision-making”.⁶⁷ Whereas access to information is one-way, consultation is a two-way flow with informed citizens providing further information to government.⁶⁸ There is no guarantee of an official response to the information and comments supplied by the public.⁶⁹ Whatever the form, to be effective, consultation must be more than an information gathering exercise. The Organisation for Economic Co-operation and Development (OECD) uses the term “openness” to describe this flow of information to government decision makers:

“Openness, meaning that governments listen to citizens and businesses, and take their suggestions into account when designing and implementing public policies.”⁷⁰

At times, it seems that when “participation” is proposed, what is actually meant is consultation of this kind. The 2009 United States Office of Management and Budget Open Government Directive described participation as follows:

“Participation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society.”⁷¹

For the OECD, active participation involves greater public input into the policy-making process:

“Active participation is regarded as a relation based on partnership with government, in which citizens actively engage in defining the process and content of policy-making. It acknowledges equal standing for citizens in setting the agenda, proposing policy options and shaping the policy dialogue – although the responsibility for the final decision or policy formulation rests with government. Active participation recognises the capacity of citizens to discuss and generate policy options independently. It requires governments to share in agenda-setting and to ensure that policy proposals generated jointly will be taken into account in reaching a final decision.”⁷²

Even with this interpretation of “active” participation “the responsibility for the final decision or policy formulation rests with

⁶⁷ Helena Catt and Michael Murphy, *What Voice for the People? Categorising Methods of Public Consultation*, 38 AUSTRALIAN JOURNAL OF POLITICAL SCIENCE 407, 407 (2003).

⁶⁸ Organisation for Economic Co-operation and Development (OECD), *Citizens as Partners; Information, Consultation, and Public Participation in Policy-Making* 12 (2001): http://www.oecd-ilibrary.org/governance/citizens-as-partners_9789264195561-en.

⁶⁹ Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE LAW & POLICY REVIEW 79, 87 (2012); Nina Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEORGE WASHINGTON LAW REVIEW 1343, 1363-1364, 1367 (2011).

⁷⁰ Organisation for Economic Co-operation and Development (OECD), *Open Government; Fostering Dialogue with Civil Society* 10 (2003).

⁷¹ UNITED STATES. OFFICE OF MANAGEMENT AND BUDGET (OMB) OPEN GOVERNMENT DIRECTIVE (M-10-06) December 8, 2009: http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf> The OMB used ‘collaboration’ to describe an active involvement.

⁷² Organisation for Economic Co-operation and Development (OECD), *Citizens as Partners; Information, Consultation, and Public Participation in Policy-Making* 12 (2001): http://www.oecd-ilibrary.org/governance/citizens-as-partners_9789264195561-en.

government.”⁷³ Public access to official information, and public submissions to decision-makers does not involve full participation because these processes do not alter the allocation of decision-making powers in a representative democracy. With the repositories of decision-making powers unchanged, the promises emerging from theories of participatory democracy have led to a mismatch in expectations about what open government can really achieve.

Although participatory democracy was once a radical concept of democratic theory, emerging from student and workers’ movements in the 1960s and 1970s⁷⁴ with citizens involved directly in decision-making in all spheres of life, it has recently been described as “mainstream” and has been “championed by businesspeople and political strategists, municipal bureaucrats and social workers”.⁷⁵ Moreover, it has become a popular and commonly used rhetorical device. However, in the freedom of information literature, calls for public participation made⁷⁶ do not really require a rewriting of the liberal traditions of representative democracy.

If anything, theories of deliberative democracy are more relevant to the type of public participation envisaged by open government. Deliberative democracy focuses upon the role of open discussion and argumentation about competing views of the public good.⁷⁷ Beyond the expression of individual positions, deliberative theorists focus upon rational discussion.⁷⁸ This discourse is conducted in the public sphere of civil society, a third realm separate from the state and the private realm. The theory suggests that so long as open discussion is protected then better arguments will emerge and prevail. This public discourse is conducted outside formal government processes and yet influences official decision-making beyond the traditionally liberal involvements of voting and elections.⁷⁹ Unobstructed flows of information are regarded as

⁷³ *Ibid.*

⁷⁴ C.B. MacPherson, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 93 (Oxford University Press 1977); Carole Pateman, *PARTICIPATION AND DEMOCRATIC THEORY* (Cambridge University Press 1970). See discussion in David Held, *MODELS OF DEMOCRACY* 209 – 216 (3rd ed Polity 2006).

⁷⁵ Francesca Polletta, *Participatory Democracy in the New Millennium*, 42(1) *CONTEMPORARY SOCIOLOGY: A JOURNAL OF REVIEWS* 40, 48 (2013).

⁷⁶ See above, Part 3.

⁷⁷ The deliberative “turn” in democratic theory has been strongly influenced by Jürgen Habermas: Jürgen Habermas, *The Structural Transformation of the Public Sphere: An enquiry into a Category of Bourgeois Society* (Polity, 1989); John Dryzek, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 1 (Oxford University Press, 2000).

⁷⁸ Joshua Cohen, *Deliberation and democratic legitimacy* in *THE GOOD POLITY; NORMATIVE ANALYSIS OF THE STATE* 17 (Alan Hamilton and Philip Pettit eds., Blackwell 1989). Theories founded upon ideals of rational debate have been criticised by commentators who are concerned about the voices of minorities that are silenced in the process. See for example: Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy* in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 120 (Seyla Benhabib ed., 1996).

⁷⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 301 (Polity Press 1996).

essential to this process.⁸⁰ If the participation discussed in the FOI literature is seen as participation through debate regarding the best directions for government policy, then calls for disclosure of official information to that public debate *and* the maintenance of confidentiality for some internal government deliberations can be reconciled. They are operating in different realms: government officials and citizens meet in the public sphere to engage in debate, but some confidential spaces are retained.

§ 4 – DELIBERATIVE MATERIAL

This brings us to vexing questions regarding the extent to which internal working documents must be disclosed under Australian FOI. The Federal FOI Act provides that deliberative material, also known as internal working documents, can be exempted from disclosure.⁸¹ If applied too broadly, an exemption for such documents can undermine the open government objective. This exemption⁸² was described by the Australian Federal Attorney-General in the first FOI annual report as: “one of the most important and also one of the most difficult provisions in the Act”.⁸³ From the outset, the Australian public service was “much concerned with how documents that form part of the decision-making processes of government ought to be treated under the proposed legislation.”⁸⁴ There were particular concerns about public access to pre-decisional material, including advice, opinions and recommendations made to decision-makers, and communications between collective decision-makers. The 1976 Interdepartmental Committee report argued that a clear distinction could be drawn between final decisions made in the exercise of a power and “the pre-decisional working out of policy.”⁸⁵ Government decision-makers argue that they ought not to be forced to work in fishbowls⁸⁶ and should be allowed some “thinking space”⁸⁷ before they release material to the public. Under the Australian Federal FOI legislation:

“A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature

⁸⁰ *Ibid* 296.

⁸¹ Australia: *Freedom of Information Act 1982* (Cth) § 47C; See also the exemptions for deliberative material in the United States: *Freedom of Information Act* 5 U.S.C. § 552b(5), and the United Kingdom: *Freedom of Information Act 2000* (UK) § 35, 36.

⁸² Or rather its § 36 predecessor.

⁸³ Australia. Commonwealth Attorney-General, *Freedom of Information Act 1982: Annual Report for the Period December 1982–June 1983*, 102 (Parliamentary Paper No 328) (1983).

⁸⁴ Australia. Commonwealth Attorney-General’s Department, *Proposed Freedom of Information Legislation; Report of Interdepartmental Committee* 8 (1974).

⁸⁵ Australia. Interdepartmental Committee on Proposed Freedom of Information Legislation, *Policy Proposals for Freedom of Information Legislation: report of interdepartmental committee* 45 (Parliamentary paper No. 400/1976) (Australian Government Publishing Service 1976).

⁸⁶ United States. *Committee on the Judiciary. Senate Report No. 813*, 89th Congress, 1st Session 9 (October 4 1965).

⁸⁷ Australia. *Department of the Prime-Minister and Cabinet, FOI Guidance Notes* [41] (July 2011): http://www.ag.gov.au/RightsAndProtections/FOI/Documents/FOI_Guidance_Notes-Word.RTF.

of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of [a government agency or Minister].”⁸⁸

As a conditional exemption, access must generally be given unless disclosure would be contrary to the public interest.⁸⁹ There is a clear public interest in disclosure, and sometimes a competing public interest in the effective and efficient administration of government that requires the early stages of government decision-making and policy development to be undertaken in confidence. How these competing public interests ought to be balanced has long been a contentious question.

Tensions surrounding the confidentiality of the decision-making processes of government are not easily resolved because it can be difficult to disentangle protected public interests from political and personal interests. Does a claim to secrecy protect the process or protect the reputations of the participants?⁹⁰ Most freedom of information exemptions require consideration of the damage that public release of particular information might cause. Exemptions are expressed in terms of likelihood of harm, or involve a weighing of public interests that includes quantifying the harm that public release may cause. For example, could an ongoing police investigation be jeopardised? Could sensitive security information be disclosed thereby causing damage to the defence of the nation? Might an individual be harmed by disclosure of personal information? However, the deliberative documents exemption refers simply to the ‘disclosure’ of deliberative matter.

In a review of the Australian Federal FOI legislation in 2013, the deliberative processes exemption was described as having no clearly established rationale; there seems to be no clear agreement about the harm that the exemption of this material is intended to protect against.⁹¹ Given that disclosure is the *raison d’être* of freedom of information, how can that alone cause harm? Reasons given for exempting deliberative material, or at least delaying disclosure, include the belief that disclosure may undermine negotiations with third parties,⁹² or impact markets that are price sensitive,⁹³ and most commonly that disclosure during the decision-making process

⁸⁸ *Freedom of Information Act 1982* (Cth) § 47C (1). Operational information that is required to be published, purely factional material, certain expert reports and formal statements of reasons are not deliberative matter: § 47C (1) – (2).

⁸⁹ *Freedom of Information Act 1982* (Cth) § 11A.

⁹⁰ After reforms to the Australian Federal Act in 2010, risk of embarrassment to senior figures is no longer a reason for refusing access to information: *Freedom of Information Act 1982* (Cth) § 11B(4).

⁹¹ Allan Hawke, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 48 (2013): <http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx>.

⁹² Australia. Department of the Prime-Minister and Cabinet, *FOI Guidance Notes* [43] (July 2011): http://www.ag.gov.au/RightsAndProtections/FOI/Documents/FOI_Guidance_Notes_-_Word.RTF.

⁹³ *Ibid* [40].

would reduce the quality and frankness of written advice going to Ministers.⁹⁴ These arguments are often time sensitive and it is premature disclosure of documents that is of concern.⁹⁵ The most contentious arguments for secrecy of deliberative material are based upon claims of future harm to ‘frankness and candour’.⁹⁶ Some argue that the quality of advice will be diminished because public servants will hold back; or that records will not be kept properly and so will be unavailable in the future. There is no doubt that the prospect of disclosure has an impact upon the way decision-making processes operate. The question is whether transparency undermines the availability of that advice, and so diminishes the decision-making process to the point that the public interest cuts against disclosure. The public service has a duty to provide frank, comprehensive advice, along with a duty to maintain good record keeping systems.⁹⁷ The idea that future public servants will ignore their statutory obligations unless they are promised confidentiality is professionally compromising. General claims of future harm must not be allowed to turn the exemption into a wide-ranging class exemption.⁹⁸

Equivocal claims of future harm aside, public disclosure of information about the development of government policy while the process is underway can influence the direction it follows, and may change the outcome. Whether or not that influence is perceived as harming the process depends very much upon the purposes ascribed to open government.

If the underlying democratic rationale for open government is accountability, then the decision-making process can be protected, and accountability can be satisfied, by disclosure to the public after a decision has been made. At that point, executive government can be called to account through an analysis of what was done, and that can include detailed information about how a decision was made, what advice was given, what options were considered, and so forth. There will be no ‘harm’ to the process because it is complete. The decision-makers are given time and, a confidential space, to make decisions before those actions are scrutinised.

⁹⁴ *Ibid* [38].

⁹⁵ *Ibid*.

⁹⁶ MOIRA PATERSON, *FREEDOM OF INFORMATION AND PRIVACY IN AUSTRALIA: GOVERNMENT AND INFORMATION ACCESS IN THE MODERN STATE* [7.15] (LexisNexis Butterworths 2005). Concern to protect frank and fearless advice was apparent from the very early days of freedom of information in Australia: Australia. SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, *FREEDOM OF INFORMATION ACT 1982; REPORT ON THE OPERATION AND ADMINISTRATION OF THE FREEDOM OF INFORMATION LEGISLATION* [2.65] – [2.72] (1987). However, external review bodies have been reluctant to accept the arguments without specific evidence of harm: *see*, for instance: *Re Eccleston and Department of Family Services, Aboriginal & Islander Affairs* [1993] 1 QAR 60; Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No. 77 (ALRC) and Report No. 40 (ARC) [9.16] (1995).

⁹⁷ For a discussion *see Mullett and Attorney-General's Department* [2012] AATA 103 [77] – [82].

⁹⁸ Judith Bannister, *Freedom of information: A new era with old tensions* in CAMBRIDGE COMPANION TO ADMINISTRATIVE LAW (Matthew Groves ed., Cambridge University Press 2014).

However, public expectations regarding the right to access government information are sometimes expressed as access in ‘real-time’ while the process is unfolding. The Australian Information Commissioner has commented on the expectations of some FOI applicants as follows:

“The apparent assumption underlying some requests – often framed as a request for ‘all drafts, emails, briefs and file notes’ – is that the requester believes they occupy a notional desk alongside the agency officer and a right instantaneously to comment upon or participate in every transaction. That is not a sustainable model for effective government in a complex age.”⁹⁹

Although not necessarily justified in this way, claims for disclosure during the decision-making process appear to be founded upon principles of participatory democracy rather than democratic accountability. The purpose of information disclosure in this scenario is to facilitate public participation in the process, rather than to account for government actions once taken.

CONCLUSION

The problem of how to interpret the deliberative documents exemption will never be truly resolved until there is agreement regarding the democratic principles that underpin open government, and the role that the general public should play in the processes of government. Are we holding government to account by disclosing official information, or using information as a tool as we actively participate in the democratic process?

⁹⁹ Presentation by Prof John McMillan, Australian Information Commissioner, to the Australian National University, 2013 Public Law Weekend, Canberra, 15 November 2013: <http://www.oaic.gov.au/news-and-events/speeches/foi-speeches/freedom-of-information-2010-2013>.

